

No. 48820-5-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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DARON KOONTZ,  
Appellant,

v.

GAYNOR FITZGERALD,  
Respondent.

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REPLY BRIEF OF APPELLANT DARON KOONTZ

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## **I. ARGUMENT**

### **A. THE TRIAL COURT ERRED IN AWARDING POST-SECONDARY EDUCATIONAL SUPPORT FOR ELARI KOONTZ BECAUSE THERE IS INSUFFICIENT EVIDENCE IN THE RECORD AS TO WHETHER ELARI IS IN FACT DEPENDENT, AND IF SO, WHAT HER NEED IS.**

Ms. Fitzgerald argues that this court should not interfere with the trial court's decision because the record does not reflect that an "injustice" has been done. (Resp't Br. at 7). Injustice is not the standard of review in this case. Rather, this court must determine whether the trial court erred by awarding post-secondary educational support for Elari Koontz based on untenable grounds or reasons; i.e. that there is insufficient evidence in the record as to whether Elari is in fact dependent, and if so, what her need is. *In re Marriage of Newell*, 117 Wn. App. 711, 718, 72. P.3d 1130 (2003). Mr. Koontz asserts that the trial court erred in awarding post-secondary educational support for Elari as the record was devoid of the information necessary to make such a decision under RCW 26.19.090.

In this case, Elari does not need post-secondary support from her parents as she is receiving more than enough in grants and scholarships to cover her tuition in full. CP at 69; 111. Elari's revised award shows that for autumn, winter, and spring quarters she is receiving \$16,336.00 in grants and scholarships (and not in loans that she is required to pay back). CP at 111. Tuition is only \$3,969.00 per quarter, totaling \$11,907.00 for

autumn, winter, and spring quarter. CP at 69. This leaves Elari with a surplus of \$4,429.00 to cover her books, fees, and other expenses. CP at 69; 111. It is clear that there is not a need for post-secondary educational support in this case.

Ms. Fitzgerald argues that this court should consider the “equal treatment of children” when determining post-secondary educational support cases. (Resp’t Br. at 16). Ms. Fitzgerald admits in her brief that she could not find any caselaw to support her position. (Resp’t Br. at 16). Ms. Fitzgerald’s argument is contradictory to RCW 26.19.090 which requires the court to look specifically at the child who the post-secondary educational request is for. RCW 26.19.090. Specifically, the statute requires the court to look at the age of the child; the child’s needs; the child’s prospects, desires, aptitudes, abilities or disabilities; and the nature of the postsecondary education sought. RCW 26.19.090.

Even if the court were to consider the equal treatment of children in this case, Ms. Fitzgerald’s argument is not compelling. No post-secondary educational support was awarded to Elari’s twin sister, Elsia. CP at 186. And Elari’s older sister, Jessica, was only in college for a few months before dropping out and moving from her mother’s home. CP at 30.

Ms. Fitzgerald states numerous times in her response that Mr. Koontz “contradicts” himself and has “misled” the court, yet she does not cite any portion of the record that would substantiate her baseless claims. (Resp’t Br. at 16-18; 20; 21; 23). All factual statements in a brief should be supported by citations to statement of facts, especially when it is claimed that evidence has been incorrectly stated by the adversary. *Newton v. Pacific Highway Transp. Co.*, 18 Wn.2d 507, 139 P.2d 725 (1943). Ms. Fitzgerald’s brief does not contain any references to the record as required by Rules of Appellate Procedure 10.4(f):

Reference to Record. A reference to the record should designate the page and part of the record. Exhibits should be referred to by number. The clerk's papers should be abbreviated as "CP"; exhibits should be abbreviated as "Ex"; and the report of proceedings should be abbreviated as "RP." Suitable abbreviations for other recurrent references may be used.

RAP 10.4(f).

One of Ms. Fitzgerald’s biggest contentions is that Mr. Koontz stated in his brief that she was ordered to supplement the record with post-secondary information on five (5) different occasions. (Appellant’s Br. at 12). Ms. Fitzgerald asserts it only occurred on three (3) separate occasions. (Resp’t Br. at 16). The fact that the court had to order Ms. Fitzgerald to supplement the record at all indicates that the award of post-secondary educational support was based on untenable grounds as the trial

court did not have enough information to grant such relief. Indeed, Ms. Fitzgerald was ordered to supplement the record on the following five (5) occasions: July 16, 2015; August 13, 2015; February 19, 2016; March 4, 2016; and March 29, 2016. CP at 59; 62-64; 106; 132; 134.

To date, Ms. Fitzgerald has still not provided the court with the court ordered information as outlined in the final order of child support, i.e. “The obligee shall provide information regarding Elari’s progress (courses completed and being taken and grades to date at university) no later than March 4, 2016. The obligee shall provide information on Elari’s grants, financial aid, and expenses to date at the University of Washington not later than March 4, 2016.” CP at 134. There is not sufficient evidence for the court to find that Elari is in fact dependent and relying upon her parents for the reasonable necessities of life or as to what her actual need is when her grants and scholarships appear to cover her costs. CP at 118-134.

Ms. Fitzgerald argues that Mr. Koontz should have sought relief under Superior Court Civil Rule 60 and that this appeal has been brought in “bad faith” for not doing so. (Resp’t Br. at 15). Mr. Koontz believes that the true error of the trial court is that it awarded post-secondary educational support to Elari *at all*. This error can only be addressed by the appeals court and is not a “clerical error” that could have been addressed

under CR 60 as Ms. Fitzgerald argues. If this court finds that the trial court did not err by awarding post-secondary educational support to Elari, then this court should find numerous errors within the order of child support that must be corrected as outlined in the argument below.

**B. IF THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING POST-SECONDARY EDUCATIONAL SUPPORT FOR ELARI KOONTZ, THEN THE TRIAL COURT MADE ERRORS IN THE PROVISIONS WITHIN THE ORDER OF CHILD SUPPORT.**

If this court finds that the trial court did not err in awarding post-secondary support to Elari, then then trial court did err in the following provisions of the final order of child support: transfer payment (3.5), the standard calculation (3.6), the termination date (3.13), post-secondary educational support (3.14), and payment for expenses not included in the transfer payment (3.15).

The trial court ordered that Mr. Koontz's motion for reconsideration was granted in part after finding that the final order of child support did not accurately reflect the Washington State Child Support Schedule Worksheets. CR 184. Specifically, the trial court found that provisions 3.5 and 3.6 in the order of child support were in error and that a new order of child support would be entered to accurately reflect the child support worksheets previously adopted by the court. CR 184. All other issues in Mr. Koontz's motion for reconsideration were denied. CR



184. A presentation hearing was held on July 8, 2016, but a new order of child support was not entered; Mr. Koontz reserved these errors in his original appellant brief. (Appellant Br. at 7).

The standard calculation at provision 3.6 of the order of child support for Elari should be \$592.92 based on the figures adopted by the trial court as set forth in the Washington State Child Support Schedule Worksheets. CP at 151-155; 167.

The transfer payment at provision 3.5 should reflect, at the minimum, the thirty-four percent (34%) deviation the trial court awarded from the standard calculation as Elari should be responsible for a portion of her support. CP at 159; 165. This results in a transfer payment of \$391.33. (Appellant's Br. at 15). However, Mr. Koontz asserts that a child support transfer payment is not needed, or the deviation should be much higher, as Elari is receiving more than enough to cover her expenses with her scholarships and grants. CP at 69; 111.

The termination date at provision 3.13 of the order of child support should follow the statutory language set forth in RCW 26.19.090(3)-(5). CP at 170.

The post-secondary educational support provision at 3.14 and the provision for payment for expenses not included in the transfer payment at provision 3.15 needs to provide that Elari is responsible for one-third (1/3)

of the total cost of tuition, books, and fees per the order of the trial court. CP at 80; 170. These provisions should also include language requiring Elari to provide receipts, tuition statements, FAFSA forms, etc. to Mr. Koontz. CP at 170.

**C. VIOLATIONS OF RULES OF APPELLATE PROCEDURE AND ATTORNEY'S FEES.**

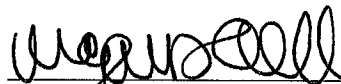
Ms. Fitzgerald's brief alleges new information and contains numerous "facts" that are not in the record and should be struck. RAP 10.3(a)(5-6). Appellate review is limited to the issues and evidence in the record before the trial court, and the appellate court does not consider arguments on appeal that are unsupported by evidence in the record. RAP 10.3(a)(5-6). In particular, Ms. Fitzgerald provided the following information that is not in the record: that Mr. Koontz allegedly signed a contract regarding post-secondary support for the parties' eldest daughter, Jessica; Elari's loan rates at roughly six percent interest rate; information about car tabs, cell phone, and a recent eyeglass purchase for Elari; post-secondary support for Jessica in the amount of \$316.47 per month; information about Mr. Koontz wife's prior employment; information about Mr. Koontz move to Florida; information about hiring a skip tracer. (Resp't Br. at 5; 8; 9; 15; 18-19). Any and all new information provided by Ms. Fitzgerald that is not in the record should be struck.

Mr. Koontz submits to this court that Ms. Fitzgerald has failed to comply with the requirements of Title 10. Under Rules of Appellate Procedure 10.7, the appellate court may (1) order the brief returned for correction or replacement within a specified time, (2) order the brief stricken from the files with leave to file a new brief within a specified time, or (3) accept the brief. The appellate court will ordinarily impose sanctions on a party or counsel for a party who files a brief that fails to comply with these rules. RAP 10.7. The court may also strike just the portion of the brief that is in noncompliance. *State v. Young*, 62 Wn. App. 895, 802 P.2d 829 (1991), opinion modified on reconsideration, 62 Wn. App. 895, 817 P.2d 412 (1991). This court also has the inherent power to award sanctions against Ms. Fitzgerald under Rules of Appellate Procedure 18.9(a) for failure to comply with these rules. RAP 18.9(a). Mr. Koontz respectfully requests this court to award his attorney's fees.

## **II. CONCLUSION**

Mr. Koontz assigns error to the trial court's award of post-secondary educational support for Elari as she is not dependent upon her parent's for the reasonable necessities of life and she does not have a need for post-secondary educational support. In the alternative, if the court does not find error in the award of post-secondary educational support, then this court should find errors in the final order of child support.

Respectfully submitted this 6<sup>th</sup> day of September, 2016.

A handwritten signature in black ink, appearing to read 'Megan D. Card', written over a horizontal line.

MEGAN D. CARD, WSBA #42904  
Attorney for Appellant Koontz

**RODGERS KEE & CARD**

**September 06, 2016 - 2:49 PM**

**Transmittal Letter**

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Sender Name: Megan Card - Email: [meganc@buddbaylaw.com](mailto:meganc@buddbaylaw.com)

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NO. 48820-5-II  
  
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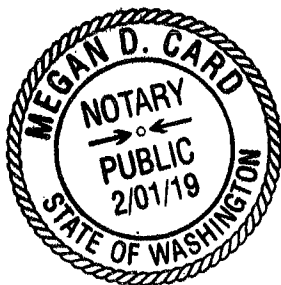
That I am now and at all times herein mentioned was a citizen of the United States, a resident of the State of Washington, and over the age of eighteen (18) years and not a party to or interested in the above-entitled matter.

Gaynor Fitzgerald [email address redacted at request of Respondent]

of September, 2016.

  
Amy Rau

NOTARY PUBLIC in and for the State of  
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My commission expires: 2/1/19



**RODGERS KEE & PEARSON**

**September 06, 2016 - 2:50 PM**

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